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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

RONALD LEE ROBERTS,

Defendant and Appellant.

B203977

(Los Angeles County  
Super. Ct. No. TA091791)

APPEAL from a judgment of the Superior Court of Los Angeles County,  
David Sotelo, Judge. Affirmed.

Mark Yanis, under appointment by the Court of Appeal, for Defendant and  
Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant  
Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Lance E.  
Winters and David Zarmi, Deputy Attorneys General, for Plaintiff and  
Respondent.

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Ronald Lee Roberts appeals the judgment entered following his conviction by jury of possession for sale of phencyclidine. (Health & Saf. Code ,§ 11378.5.) Roberts admitted a prior conviction within the meaning of Health and Safety Code section 11370.2, subdivision (b), and service of five prior prison terms within the meaning of Penal Code section 667.5, subdivision (b). The trial court sentenced Roberts to a term of seven years in state prison. Roberts contends defense counsel rendered ineffective assistance at trial and the waiver of constitutional rights in connection with the admission of the prior conviction allegations was defective. We reject these claims and affirm the judgment.

### **FACTS AND PROCEDURAL BACKGROUND**

#### *1. The trial evidence.*

On July 20, 2007, Los Angeles Police Officers Robert Saito and Arman Jose were on patrol in the area of 92nd Street and Figueroa Boulevard when they saw Roberts operating a bicycle on the sidewalk at 11:00 p.m. without a light in violation of the Vehicle Code. Saito got out of the police vehicle and instructed Roberts to stop. Roberts swerved around Saito and pedaled rapidly from the scene. Saito and Jose followed Roberts and saw him drop a brown paper bindle. Saito detained Roberts and Jose recovered the bindle which contained a clear vial of amber liquid.

A criminalist testified the vial contained 20 milliliters of a liquid that contained PCP. No qualitative analysis of the liquid was performed.

Roberts had three miniature cigars and \$84 in currency consisting of two \$20 bills, one \$10 bill, four \$5 bills and fourteen \$1 bills.

When Saito asked if Roberts were on probation or parole, Roberts responded he was on parole for possession for sale of PCP. Roberts said he was on his way home and he did not have a job. Saito, a drug recognition expert, testified Roberts did not appear to be under the influence of PCP. Saito believed the vial contained enough PCP to provide “hundreds” of doses.

Jose testified Roberts said he was “done,” and that it was stupid of him. Roberts also said, “ ‘That’s my juice. I use it for personal use.’ ” Roberts stated he smokes PCP because of a hip injury. He was taken to the jail dispensary after his arrest.

Los Angeles Police Detective Michael Owens opined that Roberts possessed the PCP for the purpose of sale. Owens indicated 20 milliliters is “far more than what normally would be possessed . . . for personal use only.” Owens had never encountered an individual in the southeast area of Los Angeles who possessed this amount of PCP for personal use. A typical PCP user will possess one, or at most two, cigarettes that have been dipped in PCP. At the high end, a dipped cigarette will contain 1 milliliter. The vial recovered in this case contains about 20 times what someone would possess for personal use. The vial could be purchased for approximately \$100, which would reflect a “bulk price.” If the contents of the vial were sold on the street, 80 to 100 cigarettes could be dipped in it and each cigarette would sell for \$10. Thus, the street value of the vial was between \$800 and \$1,000. A seller of narcotics typically possesses mixed denominations of currency as Roberts possessed here. Owens testified Roberts’s statement that he possessed the PCP for personal use reflects understanding that possession for sale is a more serious offense than simple possession.

b. *Closing argument.*

In the course of argument, the prosecutor indicated the PCP in the vial was like “rocket fuel” and the vial contained “\$10,000” worth of PCP.

Defense counsel argued that if this PCP was worth “ten grand . . . , why is [Roberts] riding a bike? It doesn’t add up, ladies and gentlemen.” Counsel also argued the criminalist had failed to perform a qualitative analysis of the contents of the vial and the jury therefore could not be certain the vial contained a usable amount.

In closing argument, the prosecutor again referred to the contents of the vial as being worth \$10,000.

*c. Verdict, admission of the prior conviction allegations and sentencing.*

After the jury returned a guilty verdict, Roberts waived jury trial on the prior conviction allegations and the matter was traileed to the next day for court trial.

At the outset of the resumed proceedings, the trial court advised Roberts the information alleged a prior conviction of a violation of Health and Safety Code section 11378.5, possession for sale of PCP, in 1996 and asked if Roberts admitted that charge. Roberts responded, “Yes, I do.” Roberts indicated he understood this admission potentially increased the term that might be imposed by three years under Health and Safety Code, section 11370.2, subdivision (b), and one year under Penal Code section 667.5, subdivision (b). The trial court asked whether additional waivers were required, then advised Roberts he had the right to have the People prove the prior conviction allegation beyond a reasonable doubt. Roberts indicated he understood and that he was waiving the right to challenge any evidence the People would submit to prove the allegation. Defense counsel joined in the waivers and admission.

The prosecutor then asked the trial court to take Roberts’s admission to the alleged prior convictions of Health and Safety Code section 11377 in 2005 and 2003. Roberts admitted both offenses and admitted he was convicted of a violation of Penal Code section 12021 in 2000. Roberts also admitted a prior conviction of driving a vehicle without the owner’s consent in 1995.

Based on these admissions, the trial court indicated that, although the maximum term in this matter was 11 years, it would sentence Roberts to no more than 8 years in state prison. Thereafter, at the sentencing hearing, the trial court imposed a prison term of 7 years.

## CONTENTIONS

Roberts contends defense counsel rendered ineffective assistance in: (1) failing to request a limiting instruction with respect to his admission he had a prior conviction of possession for sale of PCP; and, (2) failing to object to the prosecutor's closing argument with respect to the value of the vial of PCP. Roberts further contends the true findings on the prior conviction allegations must be set aside because the record does not reflect a knowing and voluntary waiver of his constitutional rights.

## DISCUSSION

### 1. *Roberts fails to demonstrate ineffective assistance of counsel.*

#### a. *Failure to request a limiting instruction.*

##### (1) *Background.*

Prior to opening statements, defense counsel asked the trial court to exclude the statement Roberts made during the course of the arrest that he was on parole for possession for sale of PCP, citing Evidence Code section 352.

The People argued the statement was relevant to show that Roberts claimed personal use of the PCP only to avoid conviction of possession for sale. The trial court took the matter under consideration. The next day, the trial court ruled the prejudicial effect of the evidence did not outweigh its probative value and indicated it would allow the statement into evidence. The trial court further indicated that when the statement was offered, the trial court would "let the jurors know that the fact that Mr. Roberts is on parole is of no probative value regarding what he's charged with. The fact that he's on parole is of no evidentiary value." The trial court asked, "Okay?" and the prosecutor responded, "Okay."

However, when the prosecutor elicited the statement from Officer Saito, the trial court did not give the limiting instruction sua sponte and defense counsel did not object or request it.

On cross-examination, defense counsel referred to Roberts's parole status by asking whether Saito verified Roberts's parole status. Saito responded he contacted "Sacramento parole." The prosecutor also included Roberts's parole status in the hypothetical question posed to Detective Owens with respect to whether Roberts possessed the PCP for the purpose of sale. The prosecutor argued to the jury that Roberts's statement showed the claim of personal use was made to avoid responsibility for the greater offense.

(2) *Roberts's contention.*

Roberts contends that when the trial court failed to give the limiting instruction as it previously indicated it would, defense counsel should have requested the instruction. Roberts notes defense counsel did not request the instruction after defense counsel cross-examined Saito about the parole statement, after Owens testified Roberts's parole status was a factor in causing Owens to conclude the PCP was possessed for the purpose of sale, or after the prosecutor mentioned parole status in closing argument.

Roberts claims that in failing to ensure the trial court gave the limiting instruction, defense counsel failed to seek full implementation of the trial court's ruling. (*People v. Heldenburg* (1990) 219 Cal.App.3d 468, 472.) Roberts argues defense counsel could not have failed to request the instruction to prevent drawing unwanted attention to Roberts's parole status because defense counsel raised the issue on cross-examination.

Roberts contends the error was prejudicial because the evidence of possession for sale was weak in that Roberts did not possess a cell phone or pay/owe sheets, the currency found on his person was an unremarkable assortment of bills, the three cigars were consistent with personal use of PCP and the bulk value of the vial was only \$100. Thus, a reasonable juror could have concluded the evidence did not show possession for sale.

Further, rather than limiting the jury's consideration of Roberts's statement, the instructions given by the trial court, especially CALCRIM No. 358,<sup>1</sup> allowed the jury to decide how much importance to give the statement. This permitted the jury to use of the statement as a substitute for proof of the current offense. (*People v. James* (2000) 81 Cal.App.4th 1343, 1353.)

Roberts's concludes defense counsel's omission so undermines confidence in the result that the matter should be reversed and remanded for a new trial.

(3) *Relevant legal principles.*

In order to prevail upon a claim of ineffective assistance of counsel, an appellant "must establish not only deficient performance, i.e., representation below an objective standard of reasonableness, but also resultant prejudice. [Citation.] Tactical errors are generally not deemed reversible, and counsel's decisionmaking must be evaluated in the context of the available facts. [Citation.] To the extent the record on appeal fails to disclose why counsel acted or failed to act in the manner challenged, we will affirm the judgment 'unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation . . . .' [Citation.] Finally, prejudice must be affirmatively proved; the record must demonstrate 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citations.]" (*People v. Bolin* (1998) 18 Cal.4th 297,

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<sup>1</sup> CALCRIM 358 advised the jury: "You have heard evidence that the defendant made oral statements before the trial. You must decide whether or not the defendant made any such statements, in whole or in part. If you decide that the defendant made such statements, consider the statements, along with all the other evidence, in reaching your verdict. It is up to you to decide how much importance to give to such a statement. [¶] You must consider with caution evidence of a defendant's oral statement unless it was written or otherwise recorded."

333; *Strickland v. Washington* (1984) 466 U.S. 668, 694 [80 L.Ed.2d 674]; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-218.)

The “review of counsel’s performance is to be highly deferential. . . . Because of the difficulties inherent in making the evaluation [of counsel’s tactical choices], a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action “might be considered sound trial strategy.” [Citation.] There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. [Citation.]’ [Citation.]” (*People v. Duncan* (1991) 53 Cal.3d 955, 966.)

(4) *Application.*

Here, defense counsel could have concluded it was not in Roberts’s interest to request a limiting instruction with respect to Roberts’s parole status believing it would only draw undue attention to that fact without adding anything of significance to the defense case or the jury’s consideration of the evidence. (*People v. Hinton* (2006) 37 Cal.4th 839, 878.)

We note that at no point in the proceedings did defense counsel request a limiting instruction in connection with the request to exclude Roberts’s statement that he was on parole. Rather, the trial court offered to give the instruction and the prosecutor agreed with the trial court’s suggestion.

In any event, a limiting instruction would not have altered the result. Roberts possessed enough PCP for “hundreds” of uses. Even with a limiting instruction, Roberts would have been convicted of possession for sale.

With respect to Roberts’s attempt to demonstrate prejudice by asserting instructional error, CALCRIM 385 advised the jury to view the defendant’s oral statements with caution. It was in this context that the jury was told it was permitted to decide the “meaning and importance” of the statement.

In sum, Roberts cannot establish either that his defense counsel's omission fell below a standard of reasonable competence, or that the omission was prejudicial under the standard applicable to an ineffective assistance of counsel claim. (*People v. Ledesma*, *supra*, 43 Cal.3d at pp. 217-218.)

b. *Failure to object to the prosecutor's closing argument.*

In closing and final arguments, the prosecutor claimed Roberts possessed \$10,000 worth of PCP, even though Detective Owens testified it had a bulk value of \$100 and a street value between \$800 and \$1,000. Defense counsel did not object. Instead, defense counsel argued Roberts would not be riding a bicycle if he had \$10,000 worth of PCP.

Roberts contends defense counsel rendered ineffective assistance in failing to object to the prosecutor's misstatement of the evidence, which constituted misconduct. (*People v. Davis* (2005) 36 Cal.4th 510, 550.) Roberts argues defense counsel had no plausible tactical reason for failing to object and the misstatement was prejudicial because a value of \$10,000 suggests the PCP must have been possessed for sale. This value was 10 times the expert's street valuation of the drugs and 100 times the expert's bulk value. A timely objection would have prevented these misstatements from tainting the jury's view of the evidence.

Roberts concludes the conviction must be reversed.

We are not persuaded. Defense counsel reasonably could have decided to argue the improbability of the misstated value of the PCP rather than to object to the misstatement of the evidence. Defense counsel might have reasoned it would be better to attempt to use the misstatement to Roberts's advantage than to draw attention to the actual value of the PCP, which was substantial. Defense counsel thus had a reasonable tactical purpose in not calling attention to the value of the PCP. (*People v. Hinton*, *supra*, 37 Cal.4th at p. 878.)

Further, correction of the misstatement was not likely to have altered the outcome of the trial. Roberts therefore cannot establish error or prejudice under

the standard applicable to an ineffective assistance of counsel claim. (*People v. Ledesma, supra*, 43 Cal.3d at pp. 217-218.)

2. *Sufficiency of the evidence with respect to the prior conviction allegations.*

Roberts contends the true findings on the prior conviction allegations must be set aside because Roberts did not waive the privilege against self incrimination or the right to confront and cross-examine witnesses. (*People v. Christian* (2005) 125 Cal.App.4th 688, 698.) Roberts notes he waived jury trial on the prior conviction allegations moments after being convicted of the substantive offense. When the matter was resumed the next day, the trial court immediately heard argument on punishment, then took the faulty admissions. Because the record reflects only a waiver of jury, Roberts concludes the enhancements must be stricken and the term modified.

Before a trial court may accept an admission of a prior conviction allegation, the defendant must be informed of and waive the right against self-incrimination, the right to confront witnesses, and the right to a jury trial. (*Boykin v. Alabama* (1969) 395 U.S. 238, 242-243 [23 L.Ed.2d 274]; *In re Tahl* (1969) 1 Cal.3d 122, 132-133.) If express waivers are incomplete, we review the record for affirmative evidence the admission was voluntary and intelligent, such that any error in the advisement before the waiver is harmless. (*People v. Hinton, supra*, 37 Cal.4th at p. 875, fn. 12; *People v. Howard* (1992) 1 Cal.4th 1132, 1178.)

Here, Roberts admitted the prior conviction allegations after he participated in a jury trial at which he did not testify but put the People to their proof. *People v. Mosby* (2004) 33 Cal.4th 353, is on all fours with the situation presented. In *Mosby*, after a jury convicted the defendant of selling cocaine, the defendant admitted a prior felony conviction. The defendant was not advised of his rights against self-incrimination and to confrontation and he did not waive those rights. (*Id.* at pp. 357-359, 364.)

*Mosby* explained the defendant had just been convicted by jury following a trial in which he was represented by counsel and did not testify. “Thus, he not only would have known of, but had just exercised, his right to remain silent at trial, forcing the prosecution to prove he had sold cocaine. And, because he had, through counsel, confronted witnesses at that immediately concluded trial, he would have understood that at a trial he had the right of confrontation.” (*People v. Mosby, supra*, 33 Cal.4th at p. 364.)

Further, *Mosby* indicated that in determining whether a waiver was knowing and voluntary, a court may conduct a “review of the entire record” including “ ‘a defendant’s prior experience with the criminal justice system’ . . . as . . . ‘relevant to the question [of] whether he knowingly waived constitutional rights.’ [Citation.] That is so because previous experience in the criminal justice system is relevant to a recidivist’s ‘knowledge and sophistication regarding his [legal] rights.’ ” [Citations.]” (*People v. Mosby, supra*, 33 Cal.4th at p. 365, fn. omitted.)

Here, Roberts admitted five prior prison terms. Certainly, he was experienced with the criminal justice system.

Finally, the record suggests Roberts agreed to admit the prior conviction allegations in exchange for a maximum aggregate term not to exceed 8 years in prison as against a maximum possible term of 11 years. Thus, Roberts’s current assertion constitutes little more than an attempt to trifle with the agreement he previously struck with the trial court.

The case cited by Roberts, *People v. Christian, supra*, 125 Cal.App.4th 688, is distinguishable. It involved a plea to *substantive offenses* and admissions of prior convictions. (*Id.* at pp. 691-693.) *Christian* distinguished *Mosby* on the basis the defendant in *Christian* “had *not* just participated in a trial at which he would have exercised his right[s] . . . .” (*Id.* at p. 697.)

In sum, under the totality of the circumstances, Roberts voluntarily and intelligently admitted the prior conviction and prior prison term allegations.

**DISPOSITION**

The judgment is affirmed.

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KLEIN, P. J.

We concur:

KITCHING, J.

ALDRICH, J.